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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR HERNANDEZ,

Defendant and Appellant.

B289520

Los Angeles County
Super. Ct. No. BA463499

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert C. Vanderet, Judge. Affirmed in part, sentence vacated, and remanded with directions.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Salvador Hernandez was convicted of residential burglary and commercial burglary. He asks us to vacate his sentence and remand for the court to exercise its new discretion under Senate Bill No. 1393 to strike his serious-felony prior. The People properly concede, and we agree, that defendant is entitled to the benefit of this change in the law. As such, we vacate his sentence and remand for further proceedings. We also direct the court to correct the sentencing minute order and abstract of judgment, both of which reflect fines and fees that were not imposed at sentencing. In all other respects, we affirm.

BACKGROUND¹

By information filed January 4, 2018, defendant was charged with one count of first degree burglary (Pen. Code,² § 459; count 1) and one count of second degree burglary (§ 459; count 2). The information also alleged that he had been convicted of one prior felony (a 2017 robbery in case No. BA454099, for which he was on probation) that constituted both a strike prior (§ 667, subds. (b)–(j); § 1170.12) and a serious-felony prior (§ 667, subd. (a)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he did not testify, the jury convicted defendant of both counts. Defendant waived his right to a jury trial on the prior-conviction allegation and admitted it.

The court granted defendant's motion to strike his prior conviction under *People v. Superior Court (Romero)* (1996) 13

¹ Because the facts of this case are irrelevant to the issues on appeal, we do not address them.

² All undesignated statutory references are to the Penal Code.

Cal.4th 497, and sentenced him to an aggregate term of eight years four months in prison. The court selected count 1 as the base term and sentenced defendant to seven years—the low term of two years for the residential burglary (§ 459) plus five years for the serious-felony prior (§ 667, subd. (a)), to run consecutively. The court sentenced defendant to the midterm of two years for count 2 (§ 459), to run concurrently. In case No. BA454099, for which defendant had been on probation, the court imposed one year four months—one-third the midterm of three years for count 1 (§ 211) plus one-third the prescribed term for the deadly-weapon enhancement (§ 12022, subd. (b)(1))—to run consecutively to the sentence in this case.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that we should vacate his sentence and remand for the court to exercise its new sentencing discretion under Senate Bill No. 1393. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); Stats. 2018, ch. 1013, §§ 1–2.) Defendant also contends he lacks the ability to pay the assessed fines and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

1. Resentencing is required.

When defendant was sentenced in this case, the court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement [of a sentence] under Section 667.” (§ 1385, subd. (b); *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116–1117.) Thus, though the court could (and did) strike defendant’s prior strike under *Romero, supra*, 13 Cal.4th 497, it imposed a five-year enhancement for the same prior conviction under section 667, subdivision (a).

While this appeal was pending, the California Legislature passed, and the Governor signed, Senate Bill No. 1393, which went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); *People v. Camba* (1996) 50 Cal.App.4th 857, 865 [effective date of non-urgency legislation].) The bill amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a serious-felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 is “ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) As such, Senate Bill No. 1393 applies retroactively to all cases, such as this one, that were not final when it took effect. (*Garcia*, at p. 973.)

As the People concede, defendant’s sentence must be vacated and the matter remanded to afford the court an opportunity to exercise its new discretion under the amended statutes. On remand, “the trial court ‘should conduct a hearing in the presence of defendant, his counsel, and the People to determine whether to’ strike the five-year enhancement. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 35; *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255 [at remand hearing, defendant has the right to the assistance of counsel and the right to be present].) If it decides to strike the enhancement, “the court should proceed to resentence defendant. If the court decides not to [strike the enhancement], the court should remand defendant to the custody of the Department of Corrections to serve the remainder of his term.” (*Buckhalter*, at p. 35, italics omitted.)

2. The court is directed to correct the minute order of March 22, 2018, and the abstract of judgment.

Defendant contends he lacks the ability to pay the fines and fees imposed below. (See *Dueñas, supra*, 30 Cal.App.5th 1157.) Yet our review of the sentencing transcript reveals that the court did not impose any fines or fees.

In a criminal case, the oral pronouncement of a sentence constitutes the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) “An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*); *Mesa*, at p. 471 [to the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error].) Accordingly, “[c]ourts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases” (*Mitchell*, at p. 185), may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of sentence (*id.* at pp. 185–188).

The sentencing minute order of March 22, 2018, and the abstract of judgment both indicate that the court imposed a \$60 conviction assessment (Gov. Code, § 70373), an \$80 operations assessment (§ 1465.8), and a \$400 restitution fine (§ 1202.4, subd. (b)), and imposed and stayed a \$400 parole revocation restitution fine (§ 1202.45). According to the reporter’s transcript, however, the court did not impose any of these fines and fees. As such, the sentencing minute order and abstract of judgment must be corrected to remove them. (See *Mitchell, supra*, 26 Cal.4th at pp. 185–188 [discussing the importance of correcting inaccurate

abstracts of judgment on appeal]; see also *People v. Hanson* (2000) 23 Cal.4th 355 [restitution fine constitutes punishment for double jeopardy purposes]; *People v. Stewart* (2004) 117 Cal.App.4th 907, 911 [on silent record, failure to impose fine implies finding that defendant lacks the ability to pay].)

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing consistent with the views expressed in this opinion. Upon resentencing, the court is directed to amend the sentencing minute order and the abstract of judgment to correct the errors identified in section 2 of the discussion and to send a certified copy of the amended/corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, we affirm.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.